IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 70

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company,

Appellant,

vs.

THE UNITED STATES OF AMERICA and INTER STATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S REPLY BRIEF

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Appellees' Argument Is Founded Upon Assumed Facts Not in Evidence and Conclusions of Fact Unsupported by the Record.

Throughout appellees' brief are certain erroneous assumptions of fact which it becomes incumbent upon us to mention at the outset of this reply. Among the first of these unwarranted assumptions, which frequently are brought in incidentally or inferentially, is the statement to the effect that the railroad's contractors "served other shippers be-

sides the railroad" (pp. 3, 5). The implications apparently intended are: (1) the railroad's relation to the truckers was that of a shipper, and (2) it was but one among a number of shippers "served" by each trucker—a situation supposed to imply that each trucker was himself a "motor carrier" as defined in the Motor Carrier Act and the only "carrier" involved in providing the transportation service here in question.

In this matter appellees' brief goes beyond the report of the majority of Division 5, which states (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301):

> "On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicant and have filed applications claiming 'grandfather' rights thereto."

This generalized and indefinite statement of the majority's mistaken conclusion seems on its face to mean that an unnamed number of the contractors had applied for "grandfather" rights with respect to the service performed by them for others than the applicant. It certainly falls far short of an ultimate finding to the effect that "these contractors have themselves filed applications claiming 'grandfather' rights *with respect to these operations*" (italics ours), as stated in appellees' brief (p. 5).

The evidence on these subjects was referred to in appellant's brief (pp. 13-14, 65-6). The proof was only that some of the contractors hauled some "other freight" which was quite general (R. 98, 100). The record does not show the character of such "other freight," for whom or between what points it was hauled, or whether it was handled in common, contract or private carriage; nor, with the exception noted below, whether the contractors, or which ones, if any of them, in handling such "other freight" were operating under authority of the Interstate Commerce

Commission or any state commission with respect to any such supposed operations which they might be carrying on outside of their contract operations for the Railway (R. 97-8, 100, 102-4, 105, 107, 111, 119, 125, 130, 134). The exception was Leicht Transfer & Storage Company, which it was indicated held or had applied for both interstate and intrastate certificates as a common motor carrier to operate between certain points in Wisconsin. It does not appear whether or not it applied for "grandfather" rights. Nor does it appear that it was claiming motor carrier rights on account of its performance of the contract with the Railway (R. 125-6, 134-5). As to all of the other contractors, there is no proof in the record as to whether they had filed any applications for Interstate Commerce Commission authority, "grandfather" or otherwise.*

* All of the evidence as to these other contractors is the following from the cross-examination of one of the Railway's witnesses (R. 97-8):

"Q. Mr. Starr, are you generally acquainted with the various contractors your railroad does business with?

A. Yes, sir.

Q. Do you know whether or not they have filed applications with the Interstate Commerce Commission for any type of authority under the grandfather clause?

A. I understand from what they have told me that most of them have.

Q. Do you know, for instance, the kind of authority that has been filed for by Mr. Roehlk?

A. I do not know anything about what they have filed, other than some of them have told me they have filed in accordance with the requirements of the Commission."

. . . . . .

"Q. Mr. Starr, do you know whether any contractor here present filed an application with the Interstate Commerce Commission?

A. I do not know of any that have, whether they actually have or have not."

On the other hand, it was shown without contradiction that in performing the transportation services for the Railway, here involved, these truckers acted solely under their contracts with the Railway, furnishing thereunder drivers and trucks to continue the movement of rail freight between its railroad stations via the highways according to its schedules and directions and coordinated with its rail service and were compensated for that service upon the terms specified in the contracts (R. 62-7, 75-9, 85-6, 91, 94, 97, 99, 134; Ex. 1A-4; R. 138-41). Even as to the one contractor shown to be the holder of motor carrier certificates the evidence shows it was so compensated and there was no contention that its handling of freight for the Railway was under rates published by it or subject to any obligations assumed by it as a common motor carrier (R. 134). All of this freight was transported by the railroad in its common carrier railroad operations either before or subsequent to this transportation over the highway, which was a service auxiliary to and substituted for the rail movement, the motor carrier service being rendered in limited local areas between the Railway's freight stations in order to expedite and improve the railroad's transportation service to or from the destination or originating freight station in connection with the terminal services performed by the railroad at such points (R. 62-7, 75-9; Ex. 5; R. 142).

The unwarranted assumptions pointed out above and the inferences and argument therefrom in appellees' brief serve to emphasize the error in the ultimate conclusion of the two members of Division 5 that "the application must be denied" (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301).

That ultimate conclusion, being thus based upon a statement in the report which at best can only be characterized as vague and inconclusive and which in turn is unsupported by the evidence and, in fact, contrary to the undisputed evidence, must, we believe, be set aside as violative of due process (Appellant's brief, 62-70).

Appellees' Contention That the Contract Provisions Characterizing the Truckers as Independent Contractors Are Controlling Has Been Repudiated by the Commission and Is Unsound.

Elimination of the foregoing elements from the argument presented in appellees' brief leaves, in the final analysis, their effort to support Division 5's majority report resting solely upon certain selected provisions of the contracts in question to the exclusion of all other provisions of the contracts and the ample undisputed evidence showing that the transportation of the freight in question over the highways was wholly the enterprise of the Railway, arranged for, instituted and undertaken by it and carried out by the contractors exclusively for its account as a common carrier, in which capacity it remained at all times fully responsible to the shippers and owners of the freight, both while it was being transported in railway vehicles and in highway vehicles (Appellant's brief, 8-10, 39-42).

Appellees' argument is to the effect that notwithstanding the undisputed evidence showing that in all respects the railroad at all times bore the relationship of a common carrier to the freight in question and that the contractors at no time were in possession of the freight as common carriers, the right of the Railway to a certificate confirming this motor carrier transportation service which it alone had undertaken and held itself out to perform must be denied because its form of written agreement with these contracts characterized them as "independent contractors" and contained provisions making them responsible to the Railway for injuries to persons and property and damage to cargo occurring while they were moving the freight over the highways in their vehicles. In fine, appellees contend appellant's claim of right must be denied because the vehicles in which its motor carrier service was performed

were not owned or leased by it and were operated by so-called "independent contractors."

That is, in effect, what the majority of the Division held with respect to these operations of the Chicago and North Western Railway and had held in some previous cases. But, as pointed out in appellant's brief (pp. 47-53), this theory or doctrine was exposed originally by the Commission's Chairman who sat as the presiding commissioner of Division 5, was later repudiated by the Commission as a whole and still later repudiated by the same two commissioners who adhered to it in the report accompanying the denial order here. The effect has been and still is to confirm and vest motor carrier rights under the "grandfather" clause in three other railroads where the operations are performed under the identical form of contract employed by the appellant and under accompanying circumstances, in all material respects on a par with those in the instant case, while appellant has been and is denied a certificate confirming such right in him (Appellant's brief, 47-58).

In developing this phase of their argument, appellees have again found it expedient to rely upon the erroneous assumptions which we have noted above. In connection therewith they display an extreme measure of devotion to what is termed the "control and responsibility" test invoked by the Commission in numerous cases and by the majority of Division 5 in deciding appellant's case. In this respect they apparently lose sight of the fact that this so-called "control and responsibility" test cannot rise above the statute which is its source and if the Commission violates the statute in applying that test it exceeds its powers. Action by the Commission in either cutting down or extending the statute amounts to attempted legislation by a bureau or agency possessing no legislative powers under the Constitution.

Appellant's brief, pp. 26-30, having pointed out that the application of the control and responsibility test made by the majority of Division 5 *in this case* is in the teeth of the statute and directly contrary to the congressional intent as drawn from both the background of the legislation and the plain meaning of the act, it is unnecessary for us to discuss the question whether or not the test may perform some useful purpose *in a different type of case*. The fact remains that as applied in this case it deprived appellant of his plain rights under the statute and that this has been recognized and corrected in the cases of three other railroad applicants using the identical form of contract and providing substituted motor carrier service under circumstances on all fours with applicant's case.

In correcting the prior report of Division 5, after reargument, in *Boston and Maine Transportation Co. Common Carrier Application*, 34 M. C. C. 599, the full Commission recognized the limitations of the "control and responsibility" test in application to a case of the character we have here. In so doing it used the following significant language (p. 610):

> "It must be noted, however, that the words 'direction,' 'control,' and 'responsibility' are conclusions dependent upon the facts presented in each individual case. The question cannot be decided by the existence of any single factor such as the name used on bills of lading or displayed on the vehicle, the method of payment for the service performed, or the terms of the agreement between the parties. The answer depends on a full consideration of all of the conditions connected with the transportation service."

We submit again that the rights of appellant here must be determined under the statute and not by virtue of any rule of thumb set up by the Commission.

The "Freight Forwarder" Decisions and Other Similar Cases Are Not in Point.

Again with a misconception of the facts here, appellees' argument leans heavily upon the Commission's decisions involving the claims of "freight forwarders" for "grandfather" rights—principally the *Acme Case** and the court decision sustaining the Commission's order denying the Acme application (Br., 18-20, 22, 29, 33, 35, 37, 41-2). It is contended here that the *Acme Case* should influence the court to sustain the Commission's order denying the Railway's application because of the assumed similarity in the factual situations. We point out below features which very definitely differentiate the freight forwarders' situation from that of the Railway as a common carrier by railroad and by motor vehicle.

The *Acme Case* involved six applicants, two of which actually owned and operated trucks and they were granted certificates under the "grandfather" clause. As to the others, Division 5 of the Commission in its report said (*Acme Fast Freight, Inc., Common Carrier Application*, 2 M. C. C. 415, 417):

> "The four other companies did not and do not own or operate any motor vehicles. They collect, consolidate, ship, and distribute less-than-carload lots of freight and express shipments throughout the entire United States, utilizing the services of carriers by motor vehicle, rail, and water, including the motor service of the two applicant companies above named."

In the succeeding pages of the report it is made clear that these freight forwarders owned and maintained no facilities of any kind whatever for the transportation of any of the merchandise freight traffic which they, through

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**Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211. This was the full Commission's decision on reargument, reviewing the prior decision of Division 5, 2 M. C. C. 415.

their corps of solicitors and their numerous offices scattered throughout the country, solicited for movement entirely by means of existing common carriers by rail, truck, and water. In other words, the freight forwarders' function was to arrange for the gathering and consolidation of numerous less-than-carload and less-than-truckload shipments which were destined to common points, and then to consolidate them into full carloads and obtain the more favorable carload or truckload rates by shipping such consolidated carloads as single shipments under the forwarder's name. These forwarders, having obtained control and authority over these numerous small shipments, then grouped these shipments together and caused them to be shipped as thus consolidated over the lines of common carrier railroads or common motor carriers at published tariff rates. The forwarder was named in the common carrier's billing as the shipper and was in fact the shipper of this freight. The actual owners of the freight, through their arrangements with the forwarders, held the latter responsible. But in so far as the common carrier railroad and truckers were concerned, they were fully responsible as such carriers to the freight forwarder for the discharge of their common carrier obligations with respect to the freight.

This, we submit, is quite a different situation than that presented by the record before this court. In the first place, the record here shows that the Railway has been the owner of extensive common carrier transportation facilities for the handling of L.C.L. freight in the territory involved for half a century or more; and that it instituted a motor carrier service between certain points and stations on its rail lines. That this institution of motor carrier service by the Railway was for the purpose of supplementing its rail service so as to provide a substituted over-the-highway service as a means of expediting and economizing

in the rendition of its common carrier transportation service, is proven without dispute.

In further contradistinction to the freight forwarder's situation it is further shown here without contradiction that the freight moved by the Railway's substituted motor carrier service is all solicited by the Railway's agents, moved exclusively on the Railway's billing, arranged for by direct transportation contracts (bills of lading) between the Railway and the shippers or holders of the freight; and that complete common carrier responsibility for the freight rests upon the Railway at all times. In so far as transportation of the freight by the Railway in part between certain of its stations by the motor vehicle-highway method is concerned, that is provided for by the special tariff on file with the Commission permitting the freight to be so transported by the Railway at the Railway's option.

Further, we point out again that the record in this case, unlike that with respect to the freight forwarders, does not disclose that the truck operators or contractors, whose equipment and employes are utilized by the Railway in accomplishing such substituted highway transportation service, are common carriers, except in the single instance of Leicht Transfer and Storage Co. And as to all of those contractors including Leicht, the Railway's relation to them is not that of a shipper tendering freight to them for transportation pursuant to published tariff rates on file with the Commission. On the contrary, the Railway's arrangements with these contractors, under the contracts of record in this case, are such that published tariff rates and common carrier obligations on the part of the truckers could not be involved, even if they were common carriers. Quite to the contrary, their obligations are of a special character definitely fixed by these contracts. They are required to furnish an adequate amount of equipment and

employes, and to see that same is operated on such schedules and in such manner as to handle to the satisfaction of the Railway so much of this freight as it may require them to handle from time to time: Under the contracts the Railway very properly holds the contractors responsible to it for the safe handling of freight loaded on their trucks at certain of its railroad stations and safe delivery thereof at certain other of its railroad stations designated by it. This, we submit, is an entirely different "arrangement" and an entirely different situation than that of the freight forwarders.

These basic distinguishing features are noted in Judge Hand's opinion sustaining the Commission's decision. *Acme Fast Freight v. United States*, 30 F. Supp. 968. The following passages are particularly noted on pages 970 and 971 of his opinion:

> "When the forwarder uses the services of rail or water carriers, it pays regular tariff rates therefor and acts as both consignor and consignee of the shipment." (p. 970.)
>
> "The business of forwarders is to collect small shipments of goods, consolidate them and then reship them in bulk. In their business they employ rail and water carriers and also trucks. In their railroad operations, which are the larger part of their business, their profit is derived from the spread between the carload rates under which they ship and the less-than-carload rates which the owner would have to pay. In their truck operations their profit is derived from a division of freight receipts between themselves and truck companies." (p. 971.)

Other distinguishing features are notable in the following further quotation from Judge Hand's opinion:

> "A further reason why forwarders not directly engaged in the carriage of goods should not be held common carriers within the meaning of the Act is that such forwarders have done a large business for years

and have never been subjected to control by the Commission. In *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, they were held to be shippers and as such were forbidden to receive any allowance from rail carriers with which they contracted for carriage.

* * * * * *

The Commission referred with approval to the statement of Division 5 (amended complaint, Exhibit 2) that the complainants' contention is inconsistent with the history and apparent purposes of the Motor Carrier Act. We quote the pertinent language because it sets forth what is perhaps the strongest reason for holding that the indirect operations of the four forwarders do not come within the Act: 'There is nothing in the reports or statements of the proponents of the measure, nor in the reports of the congressional committees, to indicate that regulation of forwarding companies as motor carriers was contemplated, and there are indications to the contrary. It is evident, also, that the forwarding companies were not aware that such regulation was proposed. If Congress had intended to include these companies and all of their operations within the definition of common carrier by motor vehicle as it appears in the act, would it not have made this intention clear in explicit and unmistakable language instead of leaving it for discovery only through such a process of interpretation as applicant has followed?'

The fact that the status of forwarding companies is under consideration in the Senate and that at the last Session of Congress a bill was passed in the House subjecting such companies to regulation by the Commission suggests that they have not hitherto been subject in law to a jurisdiction that has not been exercised in fact." (p. 972-3.)

The Commission and the courts for years have recognized that a freight forwarder is a shipper. *Container Service*, 173 I. C. C. 377, 390. Appellant submits that these decisions relative to freight forwarders are quite inapplicable in the instant case.

O'Malley v. *United States*, 38 F. Supp. 1, and *Moore* v. *United States*, 41 F. Supp. 786, cited and relied upon by appellees, likewise involved facts so different from the instant case as to make analysis and detailed comment unnecessary, in view of the foregoing discussion of the *Acme Case*. Suffice it to say that their operations were similar to those of freight forwarders. They were primarily consolidators. Neither of them was in the common carrier transportation business. They did not have the facilities to carry on such a business nor did they hold themselves out as common carriers. As stated in the *O'Malley Case* (38 F. Supp. at p. 3):

> "If the Commission had found that the plaintiff issued bills of lading, procured, loaded and unloaded freight, and that he controlled and directed the operations of the carriers to such an extent as to make him responsible to the shippers and to the public for their operations, a different situation would be presented."

Appellant's Claim for "Grandfather" Rights Was Not Impaired by the Restated Definition of "Common Carrier by Motor Vehicle" Enacted in 1940.

Appellees' assert (Br., p. 24-5) that under this Court's decision in *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, it was requisite that the Commission's decision of this case in 1941 be made in the light of the 1940 amended definition of "common carrier by motor vehicle" (54 Stat. 920).

It is apparent on the face of Division 5's majority report and the accompanying dissent that the decision actually was made in the light of the original definition, for the majority report states that "Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangements" (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301) and the dissent of Chairman

Eastman incorporated by reference his expression in the *Missouri Pacific Case* that all the essentials "of an 'other arrangement' such as is contemplated by the definitions of section 203(a) (14) and (15) were and have been present" (Appellant's brief, pp. 26-7; 22 M. C. C. 321, 333-6).

Therefore, if it be true that the rule of the *Ziffrin Case* and cases therein cited is applicable here, it would seem to follow that the Commission's order should be vacated because the Commission in rendering its decision did not have in contemplation or purport to apply the correct statutory provision. We venture to suggest that in such case it would be proper and fair to the Commission that the case be remanded to the District Court with such directions for reversal of the judgment there as would permit the Commission's reconsideration of the case under the amended definition. Such a course would, at the same time, afford Division 5 the opportunity to reconsider its denial order herein with a view to correcting it, as it did in the *Crooks Terminal Warehouse Case*,* so that its decision here might be harmonized with that decision and the entire Commission's decision in the *Boston and Maine Transportation Co. Case*† (Appellant's Br., 47-53). This would also afford the Commission an opportunity to eliminate the discrimination against him (Appellant's Br., 54-8)—an opportunity which we cannot help but believe the Commission would welcome, for we cannot think that the Commission would wish it to continue.

As the Commission apparently has not lost jurisdiction and it possesses a broad power to modify its outstanding orders (49 U. S. C. § 16 (6)) the possibility of corrective action by the Commission itself pending actual consideration of this appeal by this Court also suggests itself under the existing unusual circumstances.

The foregoing suggestions assume the applicability to

* 34 M. C. C. 679.

† 34 M. C. C. 599.

this case of the rule applied in the *Ziffrin Case*. We think there are logical grounds for distinguishing these two cases. Ziffrin and its affiliate were subjected to an obviously intentional congressional change in policy relative to restrictions upon so-called "dual operations," applicable alike to all motor carriers. Here the congressional purpose of the "grandfather" clause to preserve "substantial parity" between future and prior *bona fide* operation (*Alton R. R. Co.* v. *United States*, 315 U. S. 15, 22) might be obstructed by a change in the definition of those rights, applicable only to those whose rights had not been finally determined, five years after the passage of the Act and after a very great many of the 90,000 applicants (*Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 84) had received certificates confirming those rights.

We feel, therefore, that the correct rule to apply here is that stated in the cases cited in Appellant's Brief (p. 23 f. n.) that a statute will never be given retrospective effect unless clearly so intended. There appears here to have been no congressional intent to change "grandfather" rights by giving retrospective effect to the common motor carrier definition adopted five years after the "grandfather" critical date. In similar circumstances this Court considered the applicant's rights under the original definition which was in force at the time of the Commission hearing. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 482.

Be that as it may, appellee's brief diligently points out that the 1940 restatement of the definition was a change only in form without any change in substance, meaning or intent (pp. 25-30). As there stated it was not the purpose "to change the legislative intent of Congress one iota." We quite agree, for it seems to us that the 1940 definition of a "common carrier by motor vehicle" as one "which holds itself out to the general public to engage in transportation by motor vehicle" is equivalent to the original definition as

"one which undertakes, whether directly, by a lease or any other arrangement, to transport * * * for the general public." The restated definition appears to us to confirm everything said in appellant's brief as to the broad and unrestricted meaning of the expression "any other arrangement" and the comprehensive scope of the original definition (pp. 26-8, 35-8).

The expression "holds itself out" has long had a meaning well understood and generally accepted in defining the status of common carrier. The Commission (Division 5) understood that meaning before the 1940 amendment of the common motor carrier definition and expressed it thus in *Northeastern Lines, Inc., Common Carrier Application*, 11 M. C. C. 179, 182:

> "Question arises as to the meaning of the words 'holds itself out,' as applied to a common carrier. They clearly imply, we believe, that the carrier in some way makes known to its prospective patrons the fact that its services are available. This may be done in various ways, as by advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received. However the result may be accomplished, the essential thing is that there shall be a public offering of the service, or, in other words, a communication of the fact that service is available to those who may wish to use it."

In the instant case it was established by the undisputed evidence that the Railway, and it alone, held itself out to transport the freight in question between its freight stations by motor vehicle (R. 66, 80-3, 115). It alone solicited the shippers to ship their freight via this more expeditious alternative, coordinated service (R. 112-3, 115). It maintained numerous public freight stations, agents and terminal facilities and a large organization for the accommodation of shippers of this merchandise traffic transported partly by rail and partly by truck in accordance with the

special contractual arrangements made with the local truckers and confirmed by its published tariffs (R. 53-5, 75-6, 85, 122, 142).

The Railway *held itself out* and undertook to transport the freight here involved. It was the "common carrier by motor vehicle" alike under the original and the amended definition.

Conclusion.

We respectfully submit that whether it be considered in connection with the 1935 definition of "common carrier by motor vehicle" or linked with the 1940 definition, the "grandfather clause" clearly was intended to require the issuance of a certificate to a railway thus engaging in such motor carrier service, as has been done by the Commission with respect to substantially the same operations of the Rock Island, Boston and Maine, and Missouri Pacific railroads through "independent contractors" operating under the identical form of contract used by the appellant. Therefore the denial order in this case should be set aside.

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